In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1570

BALLY CASE AND COOLER, INC., OF DELAWARE,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A10) is reported at 416 F. 2d 902. The Board's decision and order (202a-211a)[1] are reported at 172 NLRB No. 106.

[1] "R." references are to the joint appendix filed by the parties in the court below.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1969, and a petition for rehearing was denied on December 15, 1969. On March 9, 1970, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including May 14, 1970, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether as a remedy for the employer's unlawful refusal to bargain, the Board could properly order the employer to cease its unlawful conduct, to bargain collectively with the union, and to embody any agreement reached in writing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A1-A2 of the Appendix to the petition.

STATEMENT

A. The Board's Findings of Fact

In February 1963, Local 2130, International Brotherhood of Electrical Workers, AFL-CIO, was certified as the bargaining representative of the production and maintenance employees at petitioner's Bally, Pennsylvania, plant, following a Board-conducted election (R. 202a). In August 1963, following

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an economic strike, the Union and the Company executed a bargaining contract effective until August 8, 1966 (*ibid.*).

By letter of May 11, 1966, the Union notified the Company of its desire to amend the 1963 agreement (R. 202a). The Company responded by letter of May 18 in which it expressed doubt that the Union continued to have majority support in the unit, gave notice of its desire to terminate the agreement as of the anniversary date, announced that it would file a representation petition "at the appropriate time," and requested the Union to join in a stipulation for an election. In the meantime, the Company agreed to meet with the Union and "discuss in good faith any subjects that you deem to be relevant" (*ibid.*). Bargaining sessions were held on June 17, July 1, July 28, July 29, and August 8, 1966 (R. 203a). On July 29, the Company presented a written proposal setting forth increased economic benefits which it was willing to include in a new contract (R. 203a). The proposed benefits included, *inter alia*, a general wage increase of 5 cents per hour, and paid vacations of two weeks after eight, instead of ten, years (R. 203a, 137a-139a). When the Union representative asked about the duration of the proposed agreement, the Company replied that, because it doubted the Union's majority status and would seek an election, it would not agree to a contract of more than one week's duration after August 8—so that the new agreement would not act as a bar to an election (R. 203a). The Union rejected the proposal and the membership authorized a strike. However, at the final bargaining session on August 8,

the Union offered to accept the Company's contract proposal if the Company would agree to a one-year duration period. The Company rejected the Union's offer and reiterated its alleged doubts as to the Union's majority status. The Company added that, since it planned to file a petition for an election on the following day, it could offer a contract on a day-to-day basis only. The following day, the Company filed a petition for an election with the Board's Regional office (R. 193a).

On August 12, a Company attorney addressed the assembled Company employees and informed them that the collective agreement had expired and that the Company had filed an election petition. He also told them that the benefits that the Company had offered in its July 29 proposal (*supra*, p. 3) would be put into effect retroactive to August 9 (R. 194a).

On August 23, the Company posted a notice on the plant bulletin board that all employees would get an additional wage increase of 20 cents per hour effective August 19 (R. 203a). On September 1, the Company posted another notice announcing that all employees with 15 years service would receive a three-week paid vacation (*ibid.*). The Union was not consulted prior to either notice (R. 124a-125a; 10a-11a).

B. The Decisions Below

The Board, in disagreement with its Trial Examiner, held that the Company had not questioned the Union's majority in good faith, and that, by withdrawing recognition from the Union on and after August 8, 1966, and by unilaterally granting substan-

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tial improvements in wages and other conditions of employment, it had violated Section 8(a)(5) and (1) of the Act (R. 206a-207a). Thus, the Board found that:

> had the [Company] believed the grounds which it asserts caused it to doubt the Union's majority were reasonable grounds for such doubt, and desired for that reason an expression of the employees untrammelled choice before extending its bargaining relationship with the Union, its more natural course of action would have been to file its RM petition at the time the Union demanded bargaining for a new agreement. That it did not do; rather, it entered into negotiations with the Union during the initial stages of which it gave no indication that a successfully negotiated contract would not govern their relations for a normal period. In this respect its conduct, despite its pronouncement, was contrary to the existence of the alleged doubt. It was not until relatively late in the negotiations, and after the Union gave indication that it was moving closer to acceptance of the [Company's] contract proposals, that [it] injected that "one week" and "day-to-day" limitation on any contract's duration * * *. [R. 205a.]

The Board further found that:

> Though the [Company] contends that the purpose of these severe limitations on the duration of any agreement that might be reached was to permit the holding of an election to resolve the alleged question concerning representation, the [Company's] subsequent course of conduct [in making unilateral changes in employment

> conditions] reveals that the [Company's] negotiating stand was part of a calculated plan designed to impress upon the unit employees that they could gain more through voluntary action of the [Company] than through representation by the Union. * * * [R. 206a.]

The Board ordered the Company to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to incorporate any agreement reached in a written agreement (R. 208a-209a).

The court of appeals enforced the Board's order in full (Pet. App. A3-A10). It pointed out (Pet. App. A7): "The decisive issue here is whether the actions of the company were taken under a reasonably based doubt asserted in good faith"; and concluded (Pet. App. A9): "we are of the opinion that the Board could reasonably infer from this pattern of conduct that the company did not in good faith seek to test the union majority in a fair election, but rather sought to stifle the union."

ARGUMENT

The issue raised by petitioner (Pet. 2)—"whether * * * [the Board] can by indirection, order a party to agree to a substantive provision of a collective bargaining agreement"—is not presented in this case. As shown (*supra*, pp. 5-6), the Board found that the Company had no good faith doubt of the Union's continued majority status and its insistence on a "day-to-day" contract was not—as it claimed—based on a desire to permit the holding of an election, but rather

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was part of its overall scheme to undermine the Union in the eyes of the employees. Contrary to petitioner's assumption (Pet. 10), the Board's order does not require the Company to agree to the one-year duration clause urged by the Union, or any other particular clause. It only requires the Company to cease and desist from insisting on a short-term contract in "bad faith," to bargain in good faith with the Union, and to embody any agreement reached, if there be one, in writing (*supra*, p. 6). Such an order is clearly an appropriate remedy for the Company's unlawful refusal to bargain.

The order here is thus totally dissimilar from that invalidated in *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, which specifically required the employer to grant the union a checkoff provision even though it had not agreed to such a provision in collective bargaining. Nor is the decision here inconsistent with *National Labor Relations Board* v. *Yutana Barge Lines, Inc.*, 315 F. 2d 524 (C.A. 9 (Pet. 11-12). There, the court, while holding that it "is not *per se* indicative of bad faith to refuse to accept a contract having a duration [less than] the certification year," [2] recognized that in "light of other conduct and circumstances [a limited duration clause could be] evidence which, along with other evidence, justified an inference of bad faith." *Id.* at 529. The latter was the situation here.

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[2] In *Yutana*, the employer sought a duration clause limited to one operating season (315 F. 2d at 529).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1970.

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